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Recent Developments

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DAMAGES — Measure Of Recovery For Partial Destruction Of Automobile. *Taylor v. King,* 241 Md. 50, 213 A.2d 504 (1965). In an action to recover for damages to his automobile, the plaintiff, who alleged that the automobile could not by repair be restored to substantially its pre-accident condition, sought and recovered damages measured by the difference between the value of his automobile immediately before and after the accident.[1]

Claiming that the automobile could have been restored to its former condition, the defendant contended that the true measure of damages was the cost of repair. On appeal, the Maryland Court of Appeals remanded the case for a determination as to whether the damaged automobile could reasonably have been restored by repair to substantially its pre-accident condition.

In so remanding the case, the Court of Appeals stated that:

> Until now, we have not had to consider a case in which there was a possibility that the injured automobile could not be restored to its prior condition . . . [but] it [is] clear that the rule in Maryland with respect to the measure of damages for injury to a motor vehicle, which has not been entirely destroyed, is the reasonable cost of the repairs necessary to restore it to substantially the same condition that it was in before the injury, provided the cost of repairs is less than the diminution in the market value due to the injury. And when the cost of restoring the motor vehicle to substantially the same condition is greater than the diminution in the market value the measure of damages is the difference between its market value immediately before and immediately after the injury.[2]

It is generally agreed that the object of awarding damages is to compensate the injured party for his loss, that is ". . . [to make] him

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1. The plaintiff had purchased his automobile at a cost of $3192.49 two months prior to the accident in which it was damaged. At the time of the accident the market value of the automobile was $3127.43. The estimated cost of fully repairing it was $1118.21; its value as salvage was $975. The trial court award of $2182.43 was obtained by subtracting the salvage value from the market value at the time of the accident and adding a $30 towing charge. Taylor v. King, 241 Md. 50, 51, 213 A.2d 504, 505 (1965).

2. Taylor v. King, 241 Md. 50, 54, 213 A.2d 504, 507 (1965). In formulating this rule, the Court relied on Fisher v. City Dairy Co., 137 Md. 601, 113 Atl. 95 (1921); Washington B. and A. Ry. v. Fingles, 135 Md. 574, 109 Atl. 431 (1920); Western Maryland R.R. v. Martin, 110 Md. 554, 73 Atl. 267 (1909); Mullan v. Hacker, 187 Md. 261, 49 A.2d 640 (1946). The first three decisions applied the rule that the proper measure of damages in the case of injured chattels is the cost of repair. In the *Mullan* case, the Court said that "the measure of damages for property is the cost of restoring it, if it can be restored to the condition it was in before the injury; but where the cost of restoring it is greater than the diminution in the market value, the correct measure is the difference between the value of the property before the injury and after." Mullan v. Hacker, 187 Md. 261, 270, 49 A.2d 640, 644 (1946).

whole as nearly as that may be done by an award of money."[3] In cases where an automobile is completely destroyed[4] or reduced to salvage,[5] it is clear that an award measured by the value of the automobile at the time of the injury less any salvage value adequately compensates the injured party. Where, as in the instant case, an automobile is only partially destroyed, the courts have established diverse rules for measuring damages. Some courts award damages based on the cost of repairs necessary to restore the automobile to substantially its pre-injury condition.[6] Damages calculated on this basis adequately compensate an injured party only if the repaired automobile closely approximates its pre-injury market value.[7] To avoid this unjust situation, some courts measure damages by the cost of repairs and then adjust this amount in such a way that the final award will equal the market value of the automobile prior to its injury.[8] Most courts, however, measure damages by the diminution in the market value of the injured automobile,[9] but generally place some emphasis on the cost of repairs as evidence of the diminution in value,[10] whether such repairs had actually been made before trial[11] or not.[12] In rare instances, damages are measured by the diminution formula or by the cost of repairs at the plaintiff's option, subject to the restriction that the cost of repairs must not exceed the diminution in market value.[13] In none of these situations is the injured party obligated to actually make repairs; however, in those jurisdictions which measure damages by the cost of repairs, if the evidence reveals that the injured automobile is susceptible of repair, that will be the measure of damages.[14] Furthermore, in some jurisdic-

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3. James, *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 583 (1956).

4. *E.g.*, Bailey v. Ford, 151 Md. 664, 135 Atl. 835 (1927); Southern County Mutual Ins. Co. v. Green Motor Co., 248 S.W.2d 959 (Tex. Civ. App. 1952).

5. *E.g.*, Atchison, Topeka and Santa Fe R.R. v. Hadley Auto Transport, 216 F. Supp. 94 (D. Colo. 1963); Sawyer v. Monarch Cab Co., 164 A.2d 340 (D.C. Mun. App. 1960).

6. *E.g.*, Sanft v. Haisfield Ford, Inc., 197 Pa. Super. 447, 178 A.2d 791 (1962). Courts which measure damages by the cost of repair often specify that in addition to restoring the automobile to substantially its pre-injury condition, the repairs must be made at reasonable cost. See Tinney v. Williams, 144 S.W.2d 344 (Tex. Civ. App. 1940). Neither may they exceed the diminution in the market value of the automobile due to its injury nor its value prior to the injury. Knox v. Akowskey, 116 A.2d 406 (D.C. Mun. App. 1955); Gass v. Agate Ice Cream, Inc., 246 N.Y. 141, 190 N.E. 323 (1934). See generally McCORMACK, DAMAGES § 124 (1935); Annot., 169 A.L.R. 1100 (1947); James, *supra* note 3.

7. See James, *supra* note 3, at 595.

8. *E.g.*, Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824 (1945); Chicago, R.I. and G. Ry. v. Zumalt, 239 S.W. 912 (Tex. Civ. App. 1922). See generally James, *supra* note 3, at 594; McCORMACK, *op. cit. supra* note 6, § 124.

9. *E.g.*, Alber v. Wise, 166 A.2d 141 (Del. 1960); Urquhart v. Marty, 61 R.I. 102, 200 Atl. 456 (1938).

10. *E.g.*, Littlejohn v. Eliansky, 130 Conn. 541, 36 A.2d 52 (1944); Teitsworth v. Kerpski, 127 A.2d 237 (Del. 1956). See generally James, *supra* note 3, at 593; McCORMACK, *op. cit. supra* note 6, § 124.

11. *E.g.*, Foshee v. McGee, 87 So. 2d 754 (La. 1956).

12. *E.g.*, United States F. & G. Co. v. P and F Motor Express, 220 N.C. 721, 18 S.E.2d 116 (1942).

13. Folter v. City of Toledo, 196 Ohio St. 238, 158 N.E.2d 893 (1959); RESTATEMENT, TORTS § 928(a) (1939). See Panilli v. Brooklyn City R.R., 236 App. Div. 577, 260 N.Y.S. 60 (1932). For a discussion of the merits of this approach, see James, *supra* note 3, at 595.

14. *E.g.*, Sanft v. Haisfield Ford, 197 Pa. Super. 447, 178 A.2d 792, at 793 (1964). *But see* Foster v. Humburg, 180 Kan. 64, 299 P.2d 46 (1956).

tions, if the automobile has been fully repaired, any recovery is limited to the cost of those repairs, if they are shown to have been reasonable.[15]

The Maryland rule stated in the *Taylor* case awards damages based either the diminution in market value or the cost of repairs, whichever amount is lower.[16] Though faithful to prior Maryland cases on damages,[17] this rule, by limiting recovery (where an automobile is repairable) to the cost of repairs without consideration of whether the market value of the repaired automobile is more or less than its pre-injury market value, can in some situations leave injured parties to some extent uncompensated for their losses. Of course, this result would be avoided if the standard of whether an automobile is repairable includes returning it to substantially the same market value, but there is no indication in the Maryland cases that repairable means more than restorable in function and appearance. The possible prejudice of the used car market against repaired vehicles seems to be ignored. However, the Maryland rule may be justifiable on the basis of judicial convenience since it avoids speculative inquiries as to market value after repair.

DEAD BODIES — The Right Of Sepulchre. *Bonilla v. Reeves,* 267 N.Y.S.2d 374 (1966). In 1958, decedent sustained a fractured skull after falling from a truck while in the course of his employment. He died in May, 1960, at which time a Dr. Thomas performed an autopsy under authorization of the County Coroner, but without the permission of any of decedent's relatives. Upon the request of the neurosurgeon who originally examined the decedent, the brain was removed and given to him for purposes of examination. The body was buried without the brain, which the neurosurgeon had never returned. In 1962 the mother of decedent's natural child brought an action in the child's behalf as the child's guardian against the employer and the neurosurgeon for damages for mental distress based on the violation of the right of sepulchre.[1] Dr. Thomas, who was not a

15. *E.g.,* Gambrell v. Audobon Ins. Co., 115 So. 2d 727 (La. 1959); Santos v. Sharz, 87 Cal. App. 758, 262 Pac. 764 (1927).

16. In taking this position, the Maryland court is among influential judicial company. See Lewis v. Adams, 18 Misc. 2d 393, 193 N.Y.S.2d 328 (1959); Santos v. Sharz, 87 Cal. App. 758, 262 Pac. 764 (1927). For a critique of this view, see James, *supra* note 3, at 595–96.

17. See note 2 *supra.*

1. The right of sepulchre was not part of the early English common law, because prior to the 16th century burial of bodies was governed solely by the church and the ecclesiastical courts. Even after the power of ecclesiastical law declined, English law was slow to recognize the right of an individual to bring action against one who interfered with or mutilated a corpse. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried." 2 BLACKSTONE, COMMENTARIES 429 (Lewis ed. 1900).

For a complete discussion of the development of the right of sepulchre, see JACKSON, LAW OF CADAVERS ch. II (1937); Note, *Property in Corpses,* 5 ST. LOUIS U.L.J. 280 (1958).

party, appeared as a witness for the plaintiff. The trial court found as a matter of law that the child was too young to suffer such damage, and on the matter of punitive damages the jury returned a verdict for defendants. On appeal, the judgment was affirmed.[2]

In this subsequent action the child sued Dr. Thomas for damages to her feelings and for mental distress arising from the Doctor's removal of decedent's brain, and the decedent's father sued Dr. Thomas, the neurosurgeon, and the workmen's compensation insurer on the same grounds. Ruling on the motions of both parties for summary judgment, the court denied plaintiff's motion and denied defendants' motion to dismiss the charges made by the father, while dismissing the child's suit on grounds of collateral estoppel.

One of the earliest cases in this country to recognize the right of a relative in a decedent's body was *Larson v. Chase*.[3] This is a qualified property right, a legal right to possession of the body for the purpose of preservation and burial.[4] A Vermont court stated that this was a correlative right arising out of the duty of the nearest relatives to bury their dead and specifically included the right to have the corpse in the same condition at burial as when death occurred.[5] Interference with this right by mutilating or disturbing the body is therefore an actionable wrong.[6]

It follows, then, that the person with the duty to bury the corpse, the spouse or nearest adult next-of-kin, may bring this action,[7] which is based on violation of the individual's qualified property right.[8] Dam-

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2. Chapparo v. Jackson 6 Perkins Co., 346 F.2d 677 (1965), *cert. denied,* 382 U.S. 931 (1965).

3. 47 Minn. 307, 50 N.W. 238 (1891).

4. A Rhode Island court termed the right "quasi-property." Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227 (1872). Many courts have adopted this terminology. Quasi-property does not imply full ownership rights and thus avoids abuses, such as sale of corpses, which could result from classifying a corpse as personal property. The right is limited narrowly to possession of the body only for the purpose of preparation for burial. Note, *Property in Corpses,* 5 ST. LOUIS U.L.J. 280, 289 (1958). The court in *Larson v. Chase* did not discuss whether a dead body was property in the ordinary commercial sense, but stated that since an individual has the right to possession of a body for purposes of burial, the inevitable conclusion is that it ". . . is his property in the broadest and most general sense of that term . . ." Larson v. Chase, 47 Minn. 307, 50 N.W. 238, 239 (1891).

5. Nichols v. Vermont Central Ry., 94 Vt. 14, 109 Atl. 905, 906 (1919). See JACKSON, THE LAW OF CADAVERS ch. III (1937), where a distinction is made between the duty to bury the body, which arises out of an individual's right to be buried after death, and the privilege of possession and control of the body in preparation for burial. Generally, the same individual has both the duty and the privilege.

6. Larson v. Chase, 47 Minn. 307, 50 N.W. 238, 239 (1891). Such interference includes failure to return removed organs to the body prior to burial. Consent given for performance of an autopsy implies permission for the autopsy to be conducted in the usual manner, which may include removal of organs for miscroscopic examination. Winkler v. Hawkes & Ackley, 126 Iowa 474, 102 N.W. 418 (1905). However, any permission given contemplates retention of the organs for only as long as is reasonably necessary for an examination. Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358, 359 (S.D. Cal. 1933).

7. Steagall v. Doctors Hospital, Inc., 171 F.2d 352, 353 (1948). See JACKSON, THE LAW OF CADAVERS ch. VI (1938), for a complete discussion of the nature of the action, who may bring it, and damages.

8. Alderman v. Ford, 146 Kan. 698, 72 P.2d 981, 984 (1937).

ages, which are generally compensatory (although punitive damages may be awarded also),[9] have two bases: (1) violation of the qualified property right, and (2) the mental suffering of the plaintiff. The former is seldom enunciated in the cases, although it seems to be a clear basis of liability since it is the foundation of the cause of action.[10] Although compensatory damages for violation of a property right are usually measured by the difference in the reasonable or market value of the property before and after the wrong was committed,[11] it is obvious that with regard to mutilation of corpses such damages are difficult to assess. For this reason most courts have allowed, as the stated grounds of recovery, principally the mental suffering on the basis that such mental suffering was the direct consequence of the willful, wanton, or malicious violation of the qualified property right.[12] One court has stated, however, that violation of the right to have returned to the body an organ which has been removed gives rise to nominal damages only.[13]

In Maryland, the right of the surviving spouse or next-of-kin to custody of the body in preparation for burial has been termed a "quasi-property" right.[14] The only Maryland case concerning mutilation of a corpse is *Young v. College of Physicians and Surgeons of Baltimore City*,[15] the facts of which are similar to those in the principal case.[16] This case gives little direct information on recovery for violation of the right of sepulchre in Maryland since plaintiff was denied recovery on statutory grounds.[17] It does indicate, however, that in Maryland the scope of recovery for this tort is strictly limited by statute.[18] Statutes

9. Grawunder v. Beth Israel Hospital Ass'n, 242 App. Div. 56, 272 N.Y.S. 171, 177 (1934).

10. "It is also elementary that while the law as a general rule only gives compensation for actual injury, yet whenever the . . . invasion of a legal right is established, the law infers damage, and if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages." Larson v. Chase, 47 Minn. 307, 50 N.W. 238, 239 (1891).

11. Mullan v. Hacker, 187 Md. 261, 49 A.2d 640, 644 (1946).

12. Alderman v. Ford, 146 Kan. 698, 72 P.2d 981 (1937); Kirksey v. Hernigan, 45 So. 2d 188, 189 (1950); Beller v. City of New York, 269 App. Div. 642, 58 N.Y.S.2d 112, 113 (1945); Larson v. Chase, 47 Minn. 307, 50 N.W. 238, 239-40 (1891). See also RESTATEMENT, TORTS § 868 (1939), which provides: "A person who wantonly mistreats the body of a dead person or who without privilege intentionally removes, withholds or operates on the dead body is liable to the member of the family of such person who is entitled to the disposition of the body." The basis of the cause of action is primarily plaintiff's mental suffering caused by the defendant's action; there is liability even though the only damage is injury to the plaintiff's feelings caused by knowledge of the defendant's conduct. Plaintiff may also recover damages for physical harm which resulted from the mental suffering caused. RESTATEMENT, TORTS § 868, comments a and b (1939).

13. Gray v. Southern Pacific Co., 21 Cal. App. 2d 240, 68 P.2d 1011, 1015 (1937). *Contra*, Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358, 359 (S.D. Cal. 1933).

14. Painter v. United States F.&G. Co., 123 Md. 301, 91 Atl. 158, 160 (1914).

15. 81 Md. 358, 32 Atl. 177 (1895).

16. For additional detail concerning the facts of the principal case, see Chaparro v. Jackson & Perkins Co., 346 F.2d 677 (2d Cir. 1965).

17. BALTIMORE CITY CODE art. 42, § 2 (1892), required a certificate stating the cause of death of anyone dying in the city, and art. 23, §§ 1, 6 and 7, authorized a post mortem examination by the Coroner when the cause of death was unknown.

18. MD. CODE ANN. art. 22, §§ 6, 7 (1957), apply now to Baltimore City and the counties and prescribe the types of deaths which are to be investigated and for which

regulating the duties of medical examiners have the effect of limiting the scope of recovery for violation of the right of sepulchre by prescribing certain spheres of action in which the examiner's or his authorized representative's treatment of a corpse is privileged,[19] to the extent that such treatment is not a wanton or malicious abuse of the privilege.[20]

Furthermore, it is unclear whether the Maryland courts would allow recovery for mental distress arising from an unprivileged violation of the right to sepulchre. Recovery for mental suffering has been allowed in personal injury cases[21] and in cases in which the nervous shock resulted in a clearly apparent physical injury.[22] In *Young v. College of Physicians and Surgeons,* the plaintiff's allegation of damage included "great mental excitement and distress and bodily suffering";[23] defendants' demurrers to the declaration on the basis that the facts alleged did not constitute a cause of action were overruled by the trial court. The appellate court did not deal with this point, however, since the jury had found that defendants' actions were within the sphere of privilege afforded by the statute. A later decision, *State v. Baltimore,*[24] however, cited the appropriate section of *C.J.S.* and an Alabama case concerning mental distress as a proper element of damages when the distress is the result of a malicious violation of an individual's property right.[25] While these stand as *dictum* only, the indication might be that in the case of mutilation of a corpse in a willful, wanton, or malicious abuse of the privilege given a medical examiner by statute, damages would be allowed for mental suffering. The *dictum* of another case, *Maloof v. U. S.,*[26] may also be indicative of the possibility that Maryland courts would allow recovery for mental suffering in violation of property right cases. Plaintiff sued for fire damage to his trees and

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autopsies may be performed by the Medical Examiner without the permission of decedent's relatives.

19. MD. CODE ANN. art. 22, § 6 (1957), when death is the result of violence, suicide, casualty, or occurs suddenly when person is in apparent health, or is unattended by a physician, or occurs in any suspicious or unusual manner.

20. The jury in *Young v. College of Physicians and Surgeons* were instructed to find for the defendant Coroner unless they found that he had acted wantonly, maliciously or corruptly in conducting the autopsy. 81 Md. 358, 32 Atl. 177, 178 (1895).

21. Sloan v. Edwards, 61 Md. 89, 99 (1883).

22. Bowman v. Williams, 164 Md. 397, 165 Atl. 182, 184 (1933); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

23. Young v. College of Physicians and Surgeons, 81 Md. 358, 32 Atl. 177 (1895).

24. 197 Md. 528, 80 A.2d 13 (1951) (widow sues for damages for death of husband caused by nervous upset and emotional strain which resulted in a heart attack, when he saw his property damaged).

25. *Id.* at 18, quoting: ". . . under ordinary circumstances there can be no recovery for mental anguish suffered by plaintiff in connection with an injury to his property. Where, however, the act occasioning the injury is inspired by fraud, malice or like motives, mental suffering is a proper element of damage." 25 C.J.S. *Damages* § 69 (1966). "Nervous reactions naturally are in the same category as those which are mental, as the result of a tort which is merely an injury to property or its possession, as distinguished from one to the person. Unless it is committed under circumstances of insult or contumely, such reactions are not considered . . . as proper elements of damages." B. F. Goodrich Co. v. Hughes, 239 Ala. 373, 194 So. 842, 847 (1940).

26. 242 F. Supp. 175 (Dist. Md. 1965).

included as an element of damage loss of aesthetic value and personal disappointment. The court stated that "where an adequate award has been made for a reasonable restoration, the wronged party may [not] obtain as an additional element of his damages an amount for subjectively measurable loss of aesthetic appreciation."[27] By negative implication, it could be said that since adequate compensatory damages are difficult, if not impossible, to assess for violation of the right of sepulchre, Maryland courts would allow recovery with mental suffering as the primary basis of damages.

LIABILITY INSURANCE — "Defense Coverage" And "No-Action" Clauses Not A Bar To Subcontractor's Recovery Of Money Withheld By Government. *L. G. Simon v. Maryland Casualty Co.*, 353 F.2d 608 (5th Cir. 1965). Plaintiff subcontracted with the general contractor on a government construction project to do electrical work in the process of which the plaintiff's employees made an error which resulted in a fire causing extensive damage to several buildings. The government, through its contracting officer withheld $32,247.82 damages from the general contractor,[1] and the contractor in turn withheld $7,886.83 from the subcontractor. The assured subcontractor, having earlier given full notice of the occurrence and the possibility of the resultant claim, formally requested the insurer to participate with the contractor in administratively and judicially challenging the government's claim and retention. The defendant declined on the basis that no suit had been filed against the insured.[2] The subcontractor then authorized the contractor and its attorneys to act on its behalf and agreed to share costs and attorneys' fees. The general contractor, after having exhausted its administrative remedies, instituted suit on the contract against the government. The Court of Claims rendered judgment against the contractor based on a finding that the negligence of the

27. *Id.* at 185.

1. 31 U.S.C.A. § 71 (1954) requires the General Accounting Office to settle and adjust all claims against the United States and this requirement has been held to allow the G.A.O. to withhold payments to contractors. See United States v. American Sur. Co. of N.Y., 158 F.2d 12 (5th Cir. 1946).

The practice of allowing the government contracting officer to initiate the offsetting procedures on monies due to the contractor has been declared valid where the government's claim arises from a transaction independent of the contract. United States v. Munsey Trust Co., 332 U.S. 234 (1947). *But see* Assignment of Claims Act of 1940, 31 U.S.C. § 203 (1954) and 41 U.S.C. § 15 (1965) for limitations on this right.

See also PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 546–48 (1964).

2. The "Defense Coverage" provision of the policy stated in point that "as respects the insurance afforded by the terms of this policy, the company shall: defend and suit against the insured alleging . . . destruction and seeking damages on account thereof . . .". 353 F.2d at 611 n.9.

subcontractor caused the destruction.[3] Plaintiff then brought this action for a declaratory judgment with respect to coverage on the general liability policy issued by the defendant in order to be reimbursed for the funds lost as a result of the money withheld by the government and the general contractor.

The insurer's disclaimer of liability was based on its contentions that because there was no "suit against the insured", the "Defense Coverage" clause[4] relieved it of any obligation to participate in the litigation[5] and that the "No-Action" clause[6] precluded any liability since there was no "judgment against the insured". In holding for the plaintiff, the court rejected both of these contentions, stating:

> A suit is against an assured when, in a judicial proceeding to which he is party (or deemed by the law to be a party), a definable claim or contention is asserted that the assured has a legal liability. . . . Similarly, it is a judgment against an assured where, in such a situation, the tribunal renders an enforceable decree adjudging that the assured has a legal obligation to pay, reimburse or bear, the loss sustained by the third party.[7]

The court then held that the subcontractor had, in effect, been party to the contractor's unsuccessful proceeding against the govern-

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3. Douglas Bros., Inc. v. United States, 319 F.2d 872 (United States Court of Claims, 1963).

4. See note 2 *supra.*

5. Generally, the insurer's duty to defend an action against its insured is a separate obligation from the duty to pay judgments, and, while the former may be broader than the ultimate liability of the insurer, it has been held that the insurer must defend any action where, if liability is established, the insurer would be liable, even where there is a "No-Action" clause in the policy. See generally 7A APPELMAN, INSURANCE LAW AND PRACTICE §§ 4682, 4684-85 (1962). The majority of jurisdictions hold that the allegations of the complaint alone determine the insurer's duty to defend, but there is a trend towards the minority view that the insurer also has an obligation to independently determine whether there is a possible liability arising out of the action, and if so, there is an obligation to so defend. See generally 7A APPELMAN §§ 4683-84; 29 AM. JUR. *Insurance* §§ 1452-53 (1940); Annot., 50 A.L.R.2d 458 (1956); 65 W. VA. L. REV. 175 (1963); 1965 INS. L.J. 651-55. Where, however, the insurer unjustifiably refuses to defend a suit, it has been uniformly held that the insured may be entitled to reimbursement from the insurer for any settlement made in good faith and for the expenses incurred in his defense of the litigation, and the insurer will be barred from invoking the provision of the "No-Action" clause. See generally 7A APPELMAN §§ 4690-91; Annot., 142 A.L.R. 809, 812 (1943); Annot., 71 A.L.R. 1457 (1931); Annot., 49 A.L.R.2d 691 (1927); Annot., 43 A.L.R. 326, 328 (1926); Annot., 34 A.L.R. 730, 738 (1925); 29A AM. JUR. *Insurance* §§ 1448-70 (1960).

6. The clause stated in full:

"11. Action Against Company

No action shall lie against the company unless as a condition precedent thereto, the insured shall have fully complied with all terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company." 353 F.2d at 612 n.11. See generally Annot., 159 A.L.R. 762 (1945), for annotation on the validity, construction and application of No-Action clauses; 29A AM. JUR. *Insurance* § 1495 (1960). For these and other standardized clauses in liability policies, see 4 RICHARDS, INSURANCE 2104, 2108 (1952).

7. 353 F.2d at 612.

ment,[8] and that the losses sustained as a result of that decision were within the coverage of the liability policy.[9]

Where a claim arising from the insured's alleged liability will necessarily or probably be adjudicated in a binding fashion by some other means than a regular judicial proceeding,[10] the coverage of an insurance policy by which the insured contracted to protect himself from liability for his negligence, would be rendered illusory if recovery was denied. Thus, attempts to deny liability under the No-Action clause have been declared invalid where an adjudication of the contractor's liability and an award of damages have been made by the Armed Services Board of Contract Appeals[11] or by arbitration proceedings under a compulsory arbitration clause in the contract between the general and subcontractors.[12]

Similarly, other courts have held that the mere fact that the liability of the insured is adjudicated by a somewhat circuitous procedure should not be allowed to defeat the coverage of the policy through a strict interpretation of the No-Action clause.[13] Thus, recovery has been allowed on the liability policy in various circumstances where a third party has a derivative liability as a result of the assured's negligence.[14] It has also been held that the No-Action clause does not

8. The substance of the court's holding was that the insurer and the subcontractor were bound under the principles of collateral estoppel by the decision of the tribunal which adjudicated the liability, 353 F.2d at 612, citing Bros., Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428 (5th Cir. 1958), where a non-party who participated in the defense of a patent infringement suit was held to be bound by the judgment of the prior action and Hartford Accident and Indemnity Co. v. Gainsville National Bank, 124 F.2d 97 (5th Cir. 1941), holding that the plaintiff was bound by an earlier judgment in which it was not a party but which was in effect for its benefit.

See JAMES, CIVIL PROCEDURE § 11.27, at 590 (1965): "A person not named as a party may in fact take over the control of an action . . . Where he does so to protect some financial or proprietory interest that he has in the judgment or in the transaction or occurrence giving rise to the action, he will be bound by the determination of fact or law involved in the judgment according to the rules of collateral estoppel . . ."

9. In American Cas. Co. v. Timmons, 352 F.2d 563 (6th Cir. 1965), on a similar fact situation, it was held that a contractor's liability insurer could not invoke a defense under the "No-Action" clause of the policy when the government withheld money on the contract for damages caused by the negligence of the contractor and the claim was adjudicated through administrative and judicial proceedings instituted by the insured, but taken over and controlled by the insurer.

10. It has been held that a contractor's failure to exhaust his administrative remedies may result in a denial of his right to a judicial remedy in the Court of Claims. United States v. Holpuch Co., 328 U.S. 234 (1946).

11. Corbetta Constr. Co. v. Michigan Mut. Liab. Co., 20 App. Div. 2d 375, 247 N.Y.S.2d 288 (1964).

12. Medawick Contracting Co. v. Travelers Ins. Co., 307 N.Y. 111, 120 N.E.2d 520 (1954); Cross Properties, Inc. v. The Home Indem. Co., 246 N.Y.S. 683, 41 Misc. 2d 822 (Sup. Ct. 1964).

13. See generally 5 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1165(b), at pp. 4136–37 (1960) which states:

> [P]ublic liability policies ordinarily are not confined to, and do not contemplate, indemnity only against direct actions by injured persons against the insured; rather, they cover losses which he may suffer by reason of being liable over to another who has been compelled to pay for damages to persons injured because of the negligence or wrongful act of the insured, or his agents, which resulted in such injuries being inflicted. In other words, the insured may sustain a loss from liability to the public on account of personal injuries caused by them, or their workmen, and such loss be brought within the terms of the policy by circuity of action, and the case be as plainly within the policy terms as though the injured person's suit had been brought against them in the first instance.

14. It has been so held where the assured was caused to pay such a claim as a result of money withheld from it. United States F.&G. v. Virginia Eng'r Co., Inc., 213

preclude a third party proceeding by the assured to bring in the insurer in order to compel it to defend an action in accordance with the insurer's obligation under the defense coverage clause,[15] and that an insurer may not invoke a No-Action clause which provides that no action will lie until after satisfaction of a judgment against the insured when an adverse judgment has been awarded in an action defended by the insurance company.[16]

TORTS — Right Of Recovery For Interference With Collection Of Judgment. *James v. Powell,* 266 N.Y.S.2d 245 (App. Div. 1966). Plaintiff had obtained judgment for $36,739.35 against Adam Clayton Powell, Jr. Alleging that Powell and his wife successfully conspired with two other defendants in the fraudulent conveyance of Puerto Rican real estate to prevent collection of the judgment, the plaintiff brought an action for damages against the parties to the transfer. Both Powells moved to dismiss, contending that since the plaintiff had no specific interest in the property conveyed, she could complain of no injury. The trial court denied the motion, and the Appellate Division affirmed, holding that a judgment creditor has a right to recover loss and expense caused by the tortious interference of a judgment debtor or third party with collection of the judgment.

In so holding, the court enlarged the remedies available to judgment creditors far beyond those allowed in most states. In the past, recovery of damages has been permitted, if at all, only when the creditor has acquired a specific interest in the property prior to the

F.2d 109 (4th Cir. 1959); Harder v. Southern Sur. Co., 200 Mo. App. 162, 204 S.W. 34 (1918); Black Mountain R.R. v. Ocean Acc. & Guar. Corp., 175 N.C. 566, 96 S.E. 25 (1918) (where a judgment was obtained against the assured by the party derivatively liable); Board of Trade Livery Co. v. Georgia Cas. Co., 160 Minn. 490, 200 N.W. 633 (1924) (where a judgment was obtained against a permissive user of the assured's vehicle, and the policy provided for coverage to such a person). See also Elliott v. Behner, 150 Kan. 876, 96 P.2d 852 (assured immune against judgment as a governmental agency); DeGregerio v. Skinner, 351 Pa. 448, 41 A.2d 653 (1940); Government Personal Auto. Ass'n v. Hagg, 131 S.W.2d 978 (Tex. Civ. App. 1939). *Contra,* Ayers v. Hartford Acc. Ins. Co., 106 F.2d 958 (5th Cir. 1939) (insured immune as a governmental agency); Hughes v. Hartford Acc. & Indem. Co., 223 Ala. 59, 134 So. 461 (1931) (insured immune as a governmental agency); Gray v. Houck, 167 Tenn. 233, 68 S.W.2d 117 (1934) (unable to obtain service on the insured); Fulleglove v. Constitution Indem. Ins. Co., 205 Wis. 463, 237 N.W. 95 (1931), *rehearing denied,* 205 Wis. 466, 238 N.W. 289 (1931) (insured could not be served).

15. Dryden v. Ocean Acc. & Guar. Corp. Ltd., 138 F.2d 291 (7th Cir. 1943); Scott v. Inter-Insurance Exchange, 352 Ill. 572, 186 N.E. 176 (1933).

16. Elliott v. Aetna Life Ins. Co., 100 Neb. 833, 161 N.W. 579 (1917); Sanders v. Frankfort, Maine Acc. & Plate Glass Ins. Co., 72 N.H. 485, 57 Atl. 655 (1904); American Indem. Co. v. Fellbaum, 114 Tex. 127, 263 S.W. 908, 37 A.L.R. 633 (1924). *Contra,* Illinois Tunnel Co. v. General Acc. Fid. & Life Ins. Co., 219 Ill. 201 (1920); Emerson v. Western Auto. Indem. Ass'n, 165 Kan. 242, 182 Pac. 647 (1919); Fidelity & Life Co. v. Martin, 163 Ky. 12, 924, 173 S.W. 307 (1915).

In Maryland, this type of clause requiring satisfaction of the judgment by the assured as a condition precedent to the insurer's liability is now illegal. MD. CODE ANN. art. 48A, § 481 (1957). Previously, it had been held that the insurer had no obligation to pay until after the insured had paid such a judgment imposed by law on it. New York Indem. Co. v. Fidelity & Deposit Co., 159 Md. 73, 149 Atl. 855 (1930); Louden & Lanchshire Indem. Co. v. Cosgriff, 144 Md. 660, 125 Atl. 259 (1924); U.S.F.&G. v. Williams, 148 Md. 289, 125 Atl. 660 (1925); Poe v. Phila. Cas. Co., 118 Md. 347, 84 Atl. 476 (1912).

interference.[1] To the majority, which did not acknowledge a distinction between secured and unsecured judgments, the issue was whether provisions of the Uniform Fraudulent Conveyance Act[2] barred the plaintiff's cause of action in tort. To the dissenting justices, however, the primary issue was whether such a cause of action exists, and the thorough dissenting opinion noted the doubtful applicability of the precedents cited to support the majority's recognition of a tort in the case of interference with the collection of an unsecured judgment.[3] The dissent also pointed out a practical problem in the administration of such a right: how, in a case involving more than one unsecured creditor, could a court determine which creditors suffered loss and expense as a result of the interference?

If a reasonably precise method of ascertaining and apportioning creditors' losses can be formulated in future decisions, the court's innovation would appear to be based on sound social policy. The existence of a tort remedy against debtors and third parties who improperly interfere with collection of judgments would likely be a far more effective deterrent to such interference than the present equitable remedies available to defrauded creditors.

TRADE REGULATION — Indefiniteness In Fair Trade Contract Prevents Its Enforcement Against Price-Cutting Retailer. *Champion Spark Plug Co. v. T. G. Stores, Inc.*, 356 F.2d 462 (4th Cir. 1966). Appellant manufacturer sought in this action to enjoin the appellee, a multipurpose discount retailer, from selling at prices stipulated in appellant's fair trade contract in violation of Maryland's Fair

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1. See, *e.g.*, Moody v. Burton, 27 Me. 427 (1847); Raymond v. Blancgrass, 36 Mont. 449, 93 Pac. 648 (1908); Klous & Co. v. Hennessey, 13 R.I. 332 (1881); Michaelson v. All, 43 S.C. 459, 21 S.E. 323 (1895); Hall v. Eaton, 25 Vt. 457 (1853); Field v. Siegel, 99 Wis. 605, 75 N.W. 397 (1898). See also Findlay v. McAllister, 113 U.S. 104 (1885); Adler v. Fenton, 65 U.S. (24 How.) 407 (1860); Kimball v. Harman, 34 Md. 407 (1871). *But see* Lineker v. Dillon, 275 Fed. 460 (N.D. Cal. 1921); Nowski v. Siedlecki, 83 Conn. 109, 75 Atl. 135 (1910); Mott v. Danforth, 6 Watts 304 (Pa. 1837).

2. N.Y. DEBTOR AND CREDITOR LAW § 278 provides:

> 1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may . . .
>
> (a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
>
> (b) Disregard the conveyance and attach or levy execution upon the property conveyed.

The section is identical with the UNIFORM FRAUDULENT CONVEYANCE ACT § 9(1). The court held that the statute did not restrict the common law remedies of a creditor.

3. Regarding Quinby v. Strauss, 90 N.Y. 664 (1882), the only New York decision cited by the majority to support its statement that a tort action for interference "is undoubtedly part of the law of this state," it has been said: "The case . . . is so meagerly reported that it is impossible to determine what was decided. . . ." Braem v. Merchants Nat'l Bank, 6 N.Y.S. 846, 849 (Sup. Ct. 1889). A later case, noted in the *James* dissent, pointed out that the principle announced in *Quinby* was dictum. Hurwitz v. Hurwitz, 31 N.Y.S. 25, 28 (Com. Pl. 1894). The case cited as precedent for the majority's observation that, "The right of action [in tort] has been recognized and discussed at length by the United States Supreme Court," in fact concerned interference with property on which execution had already been made. See Findlay v. McAllister, 113 U.S. 104, 115 (1885).

Trade Law.[1] The appellee's defense was that the appellant, in attempting to create an exemption in favor of "fleet operators," had not sufficiently defined the term "fleet operators," and, that if an injunction were granted, the appellee would be placed in jeopardy of violating the injunction unintentionally and would therefore be guilty of an unwitting contempt of court. The Court of Appeals of the Fourth Circuit accepted this defense and denied the injunction. The court weighed heavily evidence that the appellant had changed the contractual definition of the controverted term in its 1963 contract.[2] The court was also influenced by the utter confusion of the appellant's own employees in their attempts to properly classify certain customers as either "fleet operators" or "ultimate consumers". The court added that, even if there was a clear meaning of the term among trained specialists in the trade, the contract would still have been unenforceable against a diversified retailer. The court reasoned that such a retailer could not reasonably be expected to understand, obey and apply the term in its business dealings.

Fair trade acts permit manufacturers, who properly designate and communicate which of their products are to be fair traded, to stipulate minimum retail prices below which such articles may not be sold.[3] The purpose of such price maintenance is primarily to preserve the

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1. MD. CODE ANN. art. 83, §§ 102–10 (1957).

2. Under the appellant's 1961 fair trade contract, the term "fleet operator" was defined as "an account which has a suitably equipped workshop having facilities for the repair and maintenance of motor vehicles and engines, and employing at least one qualified mechanic devoting his full time to servicing and repairing its vehicles and engines." In the 1963 contract, all of these requirements were deleted and the contract provided only: "the term 'fleet operator' refers to the operator of a fleet of motor vehicles purchasing spark plugs for use in its own equipment only, and not for resale." *But see* Union Carbide & Carbon Corp. v. White River Distributors, Inc., 118 F. Supp. 541 (E.D. Ark. 1954), where the defendant asserted that an exemption "that this contract shall not apply to consumers buying for industrial or fleet use" was so vague and indefinite as to render the contract unenforceable. The court rejected this contention by finding that the quoted phrase had for many years a definite meaning in the trade: namely, "a sale to a purchaser for installation in his own equipment, the customer maintaining regular facilities for such installation." 118 F. Supp. at 546.

3. Such acts are not in violation of the Sherman Act, 15 U.S.C. §§ 1–7 (1964) or Clayton Act, 15 U.S.C. §§ 12–44 (1964), because of two amendments which legalize vertical price-fixing: McGuire Act, 15 U.S.C. § 45(a)2 (1964) and the Miller-Tydings Act, 15 U.S.C. § 1 (1964).

Vertical price-fixing occurs when parties at different levels in the distribution channels, who are not selling to the same buyers, establish agreed selling prices. Horizontal price-fixing occurs when parties, at the same level in the distribution channel or at different levels but selling to the same buyers, combine to set prices. Defendant retailers have attacked the legality of fair trade contracts where the manufacturer and retailer have been shown to be selling to the same consumer and therefore in competition with each other. The contracts in such cases are illegal and void because horizontal price-fixing is taking place. The leading case of Esso Standard Oil Co. v. Secatore's, Inc., 246 F.2d 17 (1st Cir. 1957), sets forth the principle that when a manufacturer and retailer are in competition with respect to some sales, the contract is unenforceable with respect to all sales by the retailer, both those to consumers to whom the manufacturer is also selling and those to whom he is not.

In Upjohn Co. v. Vineland Discount Health and Vitamin Center, Inc., 235 F. Supp. 191 (D.N.J. 1964), the New Jersey District Court extended the above doctrine when it denied an injunction to a manufacturer who sold fair trade drugs to hospitals, physicians, and industries employing physicians; the manufacturer sold to these parties for "promotional purposes only." The court held that such sales, regardless of the motivation for them, constituted competition with the retailer and rendered the contract void as against the defendant.

good will of the particular products. A fair trade contract binds all retailers who choose to sell the fair-traded product. The constitutionality of this "non-signer" aspect of fair trade legislation has been often questioned and generally upheld.[4] Other fair-trading retailers, as well as the manufacturer, can enforce fair trade contracts against price-cutters. The enforcement of such contracts has become increasingly difficult as more and more defenses have been recognized and accepted by the courts. The courts recognize that fair trade laws are in derogation of the common law principle that a seller should market his goods for whatever price he chooses, and it is said that for this reason enforcement has been and will continue to be curtailed. Specifically, the courts have hindered enforcement by the adoption of a rule that requires "reasonable diligence" to be exercised by the manufacturer in its policing program. Fair trade manufacturers have become saddled with a burden, therefore, which requires them to maintain costly systems designed to detect price-cutting and to warn such violators and, if such warnings go unheeded, to bring legal action. In a Maryland case, the court, in granting a manufacturer an injunction, held that the facts of each case determine whether the requisite "reasonable diligence" has been exercised.[5] The tenuous dividing line between the exercise and failure to exercise reasonable diligence is at once apparent, and this uncertainty has created great consternation among fair-trading manufacturers who wonder whether their policing programs are adequate enough to insure enforcement.[6]

The principle case is consistent with the general trend of decisions vitiating the effectiveness of the fair trade laws, and it also serves as a caveat to the draftsmen of fair trade agreements who must now strive more conscientiously for clarity. Moreover, the relatively recent creation and rapid growth of the multipurpose discount form of retailing makes it a virtual certainty that this new burden will play an increasingly important role in fair trade enforcement in the future.[7]

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4. See 25 MD. L. REV. 82 (1965) for a compendium of authorities which sustain the validity of non-signer provisions of fair trade agreements.

5. In Hutzler Bros. Co. v. Remington Putnam Book Co., 186 Md. 210, 46 A.2d 101 (1946), a retail book seller sought to enjoin a retail department store. The defense raised was that other retailers were violating the contract and that therefore the manufacturer had waived or abandoned any and all rights conferred by statute. The court found that "reasonable diligence" had been exercised and granted the injunction.

6. See 12 PRAC. LAW 25 (1966).

7. See generally 1 CALLMAN, UNFAIR COMPETITION AND TRADE MARKS 24.3(c) and (d) (1950); TRADE REG. REP. ¶ 6374.